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(Slip Opinion)

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**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

_____)	
In re:)	
)	
Del Val Ink & Color, Inc.)	RCRA (3008) Appeal No. 94-1
)	
Docket No. II-RCRA-91-0104)	
_____)	

[Decided November 3, 1994]

FINAL DECISION

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

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DEL VAL INK & COLOR, INC.

RCRA (3008) Appeal No. 94-1

FINAL DECISION

Decided November 3, 1994

Syllabus

Del Val Ink & Color, Inc. ("Del Val") appeals from a February 14, 1994 order dismissing its application for attorneys' fees under the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504, and EPA's implementing regulations, 40 C.F.R. Part 17, on the basis that the application was untimely. U.S. EPA Region II defends the dismissal of the application. The sole issue on appeal is whether Del Val's application was timely filed. The question turns on whether a May 26, 1993 order dismissing the complaint became a "final disposition" immediately upon issuance, as a voluntary dismissal, under 40 C.F.R. § 17.14(b)(2), in which case Del Val's application was not timely, or whether the order became final 45 days later, as an initial decision, under 40 C.F.R. § 17.14(b)(1), in which case the application would be timely.

Held: 1. The May 26 Order became a "final disposition," as a voluntary dismissal, on the date it was issued under 40 C.F.R. § 17.14(b)(2) because (1) the Region initiated the process of dismissing the complaint; and (2) the Region *agreed* to the dismissal with prejudice. In such circumstances, the May 26 order was not subject to any further appeal and became final on the date it was issued.

2. Del Val's application for attorneys' fees, which was filed 50 days after the final disposition, was filed beyond the 30-day time limit provided for attorneys' fees applications under Part 17. Therefore, the application was properly denied as untimely.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Firestone:

Del Val Ink & Color, Inc. ("Del Val") appeals from a February 14, 1994 order dismissing its application for attorneys' fees under the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504, and EPA's implementing regulations, 40 C.F.R. Part 17, on the basis that the application was untimely. U.S. EPA Region II defends the dismissal of the application. At issue in this appeal is whether Del Val's application was timely filed. The question turns on whether a May 26, 1993 order dismissing the complaint became final immediately upon issuance, as a voluntary dismissal, in which case Del Val's application was not timely, or whether the order became final 45 days later, as an initial decision, in which case the application would be timely. As explained below, we conclude that Del Val's application was not timely filed, and we therefore affirm the presiding officer's order denying the application.

I. BACKGROUND

The proceedings in this case were initiated on June 24, 1991, when Region II issued a complaint alleging that (1) Del Val shipped hazardous waste to an off-site facility without notifying the facility in writing of the appropriate treatment for the waste as required by 40 C.F.R. § 268.7(a), and (2) Del Val's classification of its waste on its manifests accompanying the shipment did not comply with the applicable regulations. The complaint proposed a penalty of \$63,250. Del Val answered the complaint and denied the allegations.

After settlement negotiations failed, the parties engaged in a pre-hearing exchange pursuant to 40 C.F.R. § 22.19(b). As part of this exchange, Del Val produced documentary evidence showing that its manifests complied with the applicable regulations and that it provided the requisite treatment notifications to the off-site facility. Upon receipt of this evidence undercutting the Region's claims, the Region attempted to delay the hearing and gather factual information to support its case. For example, the Region sought, unsuccessfully, to discover further information from Del Val, claiming that it needed to clarify matters raised in Del Val's pre-hearing exchange. Later, the Region failed in an attempt to postpone the hearing date, claiming it needed more time to investigate Del Val's defense. One week before the hearing, the Region requested an indefinite postponement of the hearing, stating that it needed additional information from Del Val about its hazardous waste activities. An indefinite postponement was denied, but the hearing was rescheduled.¹

Then, one week before the rescheduled hearing, the Region moved for permission to withdraw its complaint without prejudice to its ability to refile a complaint at a later date under 40 C.F.R. § 22.14(e) on the basis that it was unprepared to proceed with the hearing. That regulation provides that after an answer has been filed, a complainant can withdraw a complaint without prejudice to its ability to refile a complaint only upon a motion granted by the presiding officer. Del Val opposed the Region's motion, "request[ing] that * * * this matter should be dismissed with prejudice" because the Region never had a factual basis for filing the complaint. Respondent's Memorandum in Opposition to Complainant's Motion for Withdrawal of Complaint Without Prejudice at 1.

¹ In his order denying the Region's request for an indefinite postponement, the presiding officer suggested that if the Region was not prepared to proceed with the hearing, it could file a motion to withdraw its complaint without prejudice under 40 C.F.R. § 22.14(e).

The presiding officer denied the Region's motion to withdraw the complaint without prejudice, finding that the Region was simply "fishing" for evidence to support its claims, and concluding that grounds for dismissal of the complaint without prejudice have not been shown. Order at 3-4 (April 29, 1993). Further, the presiding officer stated that Del Val produced evidence calling into serious question the factual basis for the complaint. *Id.* at 3. Consequently, instead of merely denying the withdrawal of the complaint, and letting the case proceed to a hearing, the presiding officer proposed dismissing the complaint with prejudice, and gave the Region ten days to show why this action should not be taken.²

The Region, relying upon case law interpreting Rule 41 of the Federal Rules of Civil Procedure, which authorizes voluntary dismissals by plaintiffs both with and without prejudice, argued that a dismissal with prejudice was not warranted in this case. According to the Region, under federal court precedent, Del Val would not be prejudiced or harmed by allowing the Region to withdraw its complaint and file it again at a later date. The Region argued that "[t]he equities and the law support Complainant's position that this matter should be dismissed without prejudice." Complainant's Reply to the Order of April 29, 1993 at 4. Nevertheless, the Region stated that it "has no objection to this matter being dismissed with prejudice," because it "recently learned of an issue arising under the Paperwork Reduction Act which might affect the instant case were it to go forward." *Id.*

On May 26, 1993, the presiding officer issued a one-page order dismissing the complaint. Specifically, the presiding officer noted the Region's agreement to a dismissal with prejudice, but also stated that "Respondent has shown that Complainant is not likely to prevail on the merits." Order Dismissing Complaint (May 26, 1993) ("May 26 Order"). The Region's motion to withdraw the complaint without prejudice under 40 C.F.R. § 22.14(e) was denied, and the complaint was dismissed with prejudice.

Fifty days later, on July 15, 1993, Del Val submitted to the presiding officer an application for attorneys fees under the EAJA and EPA's implementing regulations, 40 C.F.R. Part 17. Under the EAJA, a party that prevails over the Agency in an adversary adjudication may receive an award of attorneys' fees unless the Agency's position in the adjudication was substantially justified or other circumstances make an award unjust. *See* 40 C.F.R. § 17.1. The EAJA expressly provides that a party seeking an award of attorneys' fees shall file its application

² The ten-day period was later extended by the presiding officer.

within 30 days of the "final disposition" in the administrative action. 5 U.S.C. § 504(a)(2). Agency rules define "final disposition" in relevant part to mean: (1) with regard to initial decisions, the date a decision becomes final either through disposition of an appeal to, or sua sponte review by, the Environmental Appeals Board ("EAB") or at the expiration of the period for the EAB to take sua sponte review, or (2) with regard to a "voluntary dismissal," the date it was issued. *See* 40 C.F.R. § 17.14(b). The time limitations set in 40 C.F.R. § 17.14 are jurisdictional; if violated, the Agency cannot make an award under the EAJA. *In re Biddle Sawyer Corp.*, TSCA Appeal No. 91-5, at 12 (EAB, Nov. 17, 1993). Del Val reasoned that its application was timely on the grounds that the May 26 Order is an initial decision that did not become a final disposition for EAJA purposes until the expiration of the 45-day period during which the EAB can elect to exercise sua sponte review. *See* 40 C.F.R. § 22.30(b). Because the May 26 Order was served by mail, the rules allow for adding five more days to the filing deadline. *See* 40 C.F.R. § 22.07(c). Accordingly, Del Val asserted that the May 26 Order became a final disposition under the EAJA on July 15, the day it filed its application.

The Region opposed the application arguing, *inter alia*, that the application was not timely under the EAJA. According to the Region, the May 26 Order became a final disposition for purposes of the EAJA's 30-day jurisdictional deadline on the date it was issued because it was not an initial decision but was instead a voluntary dismissal. The Region argued that it was a voluntary dismissal because the Region (1) had initiated the dismissal; and (2) had agreed to the dismissal with prejudice. The Region concluded that Del Val's application was untimely because it was filed more than 30 days after May 26.

On February 14, 1994, the presiding officer denied Del Val's application for attorney fees. The presiding officer noted that while Del Val had prevailed in an adversary adjudication with the Agency, its right to attorney fees depended upon the submission of a timely application. The presiding officer rejected Del Val's argument that the May 26 Order was an initial decision that did not become a final disposition until 45 days after the EAB's authority to review the order sua sponte expired. Rather, the presiding officer agreed with the Region and, relying upon the Region's lack of an objection to a dismissal with prejudice, concluded that the May 26 Order became a final disposition on the date it was issued. Thus, the presiding officer decided, the May 26 Order became a final disposition for purposes of the EAJA on the date it was issued, and therefore, in this case, the application was due

no later than June 30, 1993.³ Accordingly, Del Val's July 15, 1993 application was dismissed as untimely. This appeal followed.

II. ANALYSIS

The sole issue raised by this appeal is whether Del Val's application for attorney fees was submitted in a timely manner under the EAJA and EPA's implementing regulations. Whether Del Val's application met the jurisdictional time requirements of the EAJA depends upon when the May 26 Order became a final disposition for the purposes of the EAJA.

The Agency's rules implementing the EAJA define a final disposition as:

Final disposition means the later of: (1) The date on which the Agency decision becomes final, either through disposition by the Environmental Appeals Board of a pending appeal or through an *initial decision* becoming final due to the lack of an appeal or (2) the date of final resolution of the proceeding, such as settlement or *voluntary dismissal*, which is not subject to a petition for rehearing and reconsideration.

40 C.F.R. § 17.14(b) (emphasis added). Basically, § 17.14(b)(2) is intended to encompass matters that are no longer subject to further administrative action by either the presiding officer or the EAB. In other words, when a dismissal has reached a procedural stage where there is no further avenue of appeal, the matter has attained final disposition status. Applying this construction of the rule to the present case compels us to conclude that final disposition of the case occurred when the presiding officer issued the May 26 Order, because at that moment the May 26 Order was no longer subject to further administrative action. The Region was in no position to seek a rehearing or reconsideration of the order, or appeal the decision, because it had agreed to the case's dismissal with prejudice. As for Del Val, it was the prevailing party, and obviously had no reason to seek relief from the May 26 Order. Therefore, for this basic reason, as explained more fully below, we conclude that Del Val should have measured the 30-day period for filing its EAJA application from the date the May 26 Order was issued.

³ As noted above, because the May 26 Order was served by mail, the presiding officer, under 40 C.F.R. § 22.07(c), added 5 days to the 30-day filing period.

Del Val's arguments ignore the finality of the presiding officer's disposition. Citing the language of § 17.14(b)(1), Del Val contends that the May 26 Order is an initial decision under 40 C.F.R. § 22.20. Del Val contends that its opposition to the Region's motion to withdraw its complaint without prejudice should be construed as a "motion to dismiss with prejudice," as provided for under 40 C.F.R. § 22.20(a), and therefore the May 26 Order dismissing the complaint should be construed as an order granting Del Val's "motion" under § 22.20(b). Under § 22.20, a presiding officer, "upon motion of a respondent," may dismiss a complaint for the complainant's "failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant." 40 C.F.R. § 22.20(a). A dismissal granted under this rule as to all issues in a proceeding is an initial decision pursuant to 40 C.F.R. § 22.20(b).

The May 26 Order, however, does not meet the requirements of this rule. First, Del Val did not initiate the dismissal process by filing a motion to dismiss under this rule; instead, it merely opposed the Region's motion to withdraw the complaint without prejudice. Second, the presiding officer did not make either finding necessary under § 22.20(a) to dismiss the complaint: he did not find that the Region "failed to make a prima facie case," nor did he conclude that the Region had "no right to relief." Instead, the presiding officer noted only that the Region "is not likely to prevail on the merits." Accordingly, the May 26 Order is not an initial decision, and is not governed by § 17.14(b)(1) as Del Val contends.

Further, as noted above, it is clear to us that the May 26 Order became a "final disposition" as a *voluntary dismissal* under § 17.14(b)(2) on the date it was issued because it was not subject to any further administrative action. First, the Region initiated the process of dismissing the complaint by filing a motion to withdraw the complaint under 40 C.F.R. § 22.14(e) and, therefore, the Region voluntarily sought a dismissal. Second, and most importantly, the Region *agreed* to the dismissal with prejudice and, therefore, had no basis for seeking further review. Our reasoning is explained more fully as follows.

Although the § 17.14(b)(2) term "voluntary dismissal" is not a term used in Part 22, the term is used in the Federal Rules of Civil Procedure. Under the federal rules, a voluntary dismissal is one initiated by the plaintiff and it is one which may be granted with or without prejudice. *See* Rule 41(a). In contrast, a dismissal sought by the defendant is known as an "involuntary dismissal." *See* Rule 41(b). In previous decisions, we have looked to the federal rules to guide us in interpreting Part 22. *See, e.g., In re Wego Chemical & Mineral Corporation*, TSCA Appeal No. 92-4, at n.10 (EAB, Feb. 24, 1993) (and cases cited therein); *see also Puerto Rico Aqueduct and Sewer Authority v. EPA*, 39 ERC 1269, 1275

(1st Cir. 1994) (in upholding Board's interpretation of a procedural regulation in 40 C.F.R. Part 124, the court noted that the federal rules "may inform administrative practice in appropriate situations"). Applying the model encompassed by the federal rules here, it would appear that a motion by the complainant to withdraw the complaint under § 22.14(e) is akin to the voluntary dismissal identified under Rule 41(a).⁴ In addition, we find that it is a *final* disposition for purposes of § 17.14(b)(2) because the Region had agreed to the voluntary dismissal with prejudice, thus terminating all further right of review.⁵

We emphasize that § 17.14(b)(2) should not be read to suggest that all complainant-initiated "voluntary dismissals" become final for EAJA purposes on the date the dismissal is issued. In cases where a presiding officer issues a dismissal with prejudice over the complainant's objection, the Region would be entitled to appeal that dismissal as an adverse ruling under § 22.30, and thus the "final disposition" would not occur until after the appeal period had expired or the appeal was concluded.⁶ Here, however, the Region agreed to the terms of the dismissal and, therefore, there is no right of appeal. Accordingly, the May 26 Order became a "final disposition" on the date it was issued. Del Val's application for attorneys' fees, which was filed 50 days after May 26, did not meet the EAJA's jurisdictional 30-day time limit for filing such applications. Consequently, the application was properly denied on the ground that it was untimely.

Finally, we agree with the presiding officer that this result is not "contrived" but is consistent with other EAJA decisions. It is well settled * * * that the EAJA is a waiver of sovereign immunity, and therefore the terms of the

⁴ Similarly, it would appear that an involuntary dismissal under Part 22 would be one sought by a respondent pursuant to § 22.20 and is akin to the "involuntary dismissal" identified in Rule 41(b).

⁵ While § 22.14(e) addresses only withdrawals *without* prejudice, the fact that the presiding officer dismissed the complaint *with* prejudice does not alter our analysis. Where, as here, the Region agreed to a dismissal with prejudice, the presiding officer's authority to grant this relief is conferred by 40 C.F.R. § 22.04(c)(10). Section 22.04(c)(10) permits a presiding officer to "take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by these rules."

⁶ In particular, under 40 C.F.R. § 22.30(a) a party may appeal an "adverse ruling or order of the Presiding Officer." Importantly, the same result occurs under the Federal Rules of Civil Procedure. Again, using the federal rules for guidance, we note that under Rule 41(a), if a plaintiff seeks a voluntary dismissal without prejudice, but the trial court grants the dismissal with prejudice, the voluntary dismissal can be appealed by the plaintiff on the ground that the trial court abused its discretion in dismissing the case "with prejudice." See 5 Moore's Federal Practice 41-81 (2d ed. 1994) (and cases cited therein). See also *Hasse v. Sessions*, 893 F.2d 370 (D.C. Cir. 1990) (where plaintiff sought a voluntary dismissal without prejudice that was granted with prejudice over the plaintiff's objection, the voluntary dismissal was appealable, and therefore not a "final judgment" for the purposes of the EAJA provisions applicable to federal court litigation).

government's consent to be sued should be strictly construed." *Biddle Sawyer* at 12. Here, the presiding officer explained in dismissing Del Val's EAJA application:

[T]his is not a case where Del Val is being deprived of its right to fees and expenses because of some contrived strategy by Complainant. Del Val's application is denied, because it did not comply with the jurisdictional limitation that it file its application within 30 days, but, instead, relying on an erroneous interpretation of the rules, elected to wait 45 days.

Order on Application for Attorney's Fees and Other Expenses Under the Equal Access to Justice Act at 7. Del Val could have, and should have, filed its application within 30 days of the May 26 Order as a protective measure--if Del Val's conclusion that the May 26 Order was subject to further review and thus governed by § 17.14(b)(1) was correct, the application would merely have been dismissed as premature, and Del Val could have refiled it at an appropriate time. *See In re Corson Services, Inc.*, FIFRA Dkt. No. 09-0433-C-85-12 (CJO, Dec. 23, 1987) (premature request for attorneys' fees denied without prejudice). Instead of taking such a step with respect to its claim under EAJA, Del Val took a chance on its erroneous interpretation of § 17.14(b), and in so doing, missed the EAJA's jurisdictional deadline for filing an application for an award of fees and expenses.

III. CONCLUSION

For the reasons set forth above, we conclude that the May 26 Order dismissing the complaint in this matter became a final disposition under 40 C.F.R. § 17.14(b)(2) on the date it was issued. Del Val's application for attorneys' fees filed 50 days after the order became a final disposition was well beyond the jurisdictional 30-day period allowed for such applications under the EAJA. Because the application was untimely, we hereby affirm the presiding officer's denial of Del Val's application.

So ordered.